IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 266 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE R.K.ABICHANDANI
and
Hon'ble MR.JUSTICE A.R.DAVE

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

DECOM MARKETING PVT. LTD.

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR B.D. KARIA for MR KC PATEL for Petitioner

MR MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.K.ABICHANDANI
and
MR.JUSTICE A.R.DAVE

Date of decision: 27/06/2000

ORAL JUDGEMENT (Per R.K.Abichandani,J.)

The Income-tax Appellate Tribunal, Ahmedabad Bench "A" has referred the following question No.1 at the instance of the assessee and the question No.2 at the instance of the Revenue, under Section 256(1) of the Income Tax Act, 1961:-

(1) "Whether on the facts and in the circumstances of the case, the Tribunal was justified in law in disallowing the gratuity liability of Rs. 61,962/- claimed by the assessee under Section 28 and/or Section 37 of the I.T Act, 1961?"

(2) "Whether, on the facts and in the circumstances of the case, the appellate Tribunal has been right in law in treating contribution of Rs. 38,824/to Provident Fund Scheme of Human Resources Organisation Pvt.Ltd. as allowable deduction?"

The relevant assessment year was 1977-78. The assessee had claimed deduction of Rs. 61,962 before the ITO on the ground that it was a provision made for gratuity liability. The ITO disallowed the claim in view of the provisions of Section 40A(7) of the Income Tax Act, 1961. This view was confirmed by the Commissioner (Appeals). Before the Tribunal the claim was pressed on the ground that it should be allowed either under Section 28 or Section 37 of the said Act. The Tribunal rejected the claim. This question is now concluded by the decision of this Court in Navsari Cotton and Silk Mills Ltd. Vs. Commissioner of Income-tax, reported in 202 ITR 111, which is a judgement of this Court arising from a reference which was made in the earlier decision of the Tribunal, which was followed by the Tribunal in the present case. It was held by this Court that in order that gratuity payable to employees may be deductible, it is necessary that the conditions laid down in Section 40A(7) of the said Act are fulfilled. It was held that the right to receive payment accrues to the employees on their retirement or termination of their services and the liability to pay gratuity becomes an accrued liability of the assessee when the employees retire or their services are terminated. Until then, the right to receive gratuity is a contingent right and the liability to pay gratuity continues to be a contingent liability qua the employer. Similar view was taken by this Court in its decision dated 29.4.1999 in Income Tax Reference No. 292/84, relying upon the decision of the Supreme Court in Shree Sajjan Mills Ltd. Vs. Commissioner of Income-tax, M.P & anr., reported in 156 ITR 585. In this view of the

matter, we are of the opinion that the Tribunal was justified in law in disallowing the gratuity liability of the amount claimed by the assessee. Question No.1 is therefore, answered in the affirmative against the assessee and in favour of the Revenue.

The second question referred at the instance of the Revenue relates to the contribution of Rs. 38,824/- by the assessee to the Provident Fund Scheme of Human Resources Organisation Pvt.Ltd. The assessee had claimed the deduction under the provisions of Section 36(1)(iv) of the said Act and in the alternative, claimed it under Section 37 thereof. The ITO had rejected the claim, but the Commissioner (Appeals) had allowed it. The Tribunal allowed the claim following its earlier decision, in which the claim was fully allowed on an alternative ground that it was an expenditure on account of commercial expediency. It was sought to be contended on behalf of the Department that if the expenditure was of the nature described in Section 36(1)(iv) of the Act, then the deduction was not permissible under Section 37 of the Act. Under Section 37(1) of the Act, as it applied at the relevant time, any expenditure (not being the expenditure described in Sections 30 to 36 and Section 80(vv) and not being in the nature of capital expenditure or personal expenses of the assessee) laid out and expended wholly and exclusively for the purpose of business or profession shall be allowed in computing the income chargeable under the head "profit and gains" of profession or business. It was held that the sum paid by the assessee by way of contribution towards the provident fund was not in respect of the recognised provident fund. For ascertaining whether the expenditure was of the nature described in Section 36(1)(iv) of the Act, it would be necessary to enquire as to whether it was an expenditure claimed by way of contribution towards a recognised provident fund. If it is not in respect of a recognised provident fund, then it may not be termed as expenditure of the nature described under Section 36(1)(iv). Therefore, it cannot be said that merely because the contribution was towards a provident fund, it would amount to expenditure in the nature described under Section 36(1)(iv) of the Act, even if, fund was not a recognised one. Therefore, there was no bar in allowing the expenditure of this nature which was not a contribution to provident fund under Section 37(1) of the Act. We may in this context profitably refer to the decision of this Court in CIT Vs. Chhotabhai Jethabhai Patel Tobacco Products Co.Ltd., reported in 128 ITR 702, in which it was held that the contribution to provident fund made by the assessee for a period prior to its

recognition would be justifiable on the ground of commercial expediency so as to keep the workmen satisfied and to see to it that the workmen got the benefit of the provident fund. Such a payment made for the purpose of earning the profits of business or in the course of earning profits of the business satisfied all the conditions of Section 37. The High Court held that the Tribunal in that case was right in holding that the sum paid by the assessee by way of provident fund contribution even during the period prior to the recognition of the provident fund was an allowable deduction under Section 37 of the Act.

In this view of the matter, we are of the view that the Tribunal was right in treating the contribution of Rs. 38,824 to provident fund scheme of HRO Pvt.Ltd. as allowable deduction under Section 37 of the Act. Question No.2 is therefore, answered in the affirmative in favour of the assessee and against the Revenue. The reference stands disposed of accordingly with no order as to costs.

--

*/Mohandas